Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KATHLEEN CRANDALL,

Petitioner,

v.

LISA WAGNER,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District, Division Four

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When from birth, or shortly thereafter, a child's nuclear family has consisted of one legal and one psychological, or de facto parent, does the child have a right under the Fourteenth Amendment to the United States Constitution to maintain a relationship with both parents if they decide to live apart?

2. Does the legal parent's right under the Fourteenth Amendment extend to barring all contact between her child and the adult who, for years, at the legal parent's behest, lived with and acted as a parent to the child and, for several more years, continued the relationship through visitation?

3. Does an adult who has lived with a child and her legal parent from birth or shortly after, and been held out by the legal parent as the child's other parent, have an interest in maintaining a relationship with the child that is protected by the First or Fourteenth Amendment?

4. Does California law violate the Equal Protection Clause of the Fourteenth Amendment by permitting psychological, or de facto fathers but not de facto mothers to obtain visitation rights in a guardianship proceeding, or by permitting such fathers but not such mothers to establish their status as a "presumed" parent under the Uniform Parentage Act and assert parental rights over the objection of a legal parent?

PARTIES INVOLVED

Besides the parties listed in the caption to this petition, the proceedings below involved the minor children, Z.C.W. and K.G.W., who have been known throughout the appellate proceedings by their initials.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kathleen Crandall, respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division Four.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 71 Cal. App. 4th 524, and 1999 Cal. App. LEXIS 335. It is reprinted in the appendix to this petition at pages A-1 to A-9 ["App. A-1 to A-9"]. By order filed May 18, 1999, the Court of Appeal denied a petition for rehearing. (App. A-28.) By order filed July 21, 1999, the California Supreme Court denied a petition for discretionary review of the Court of Appeal's decision. (App. A-16.)

JURISDICTION OF THIS COURT

This Court has jurisdiction of this matter under 28 U.S.C. § 1257(a). Petitioner, for herself and on behalf of the children, K.G.W. and Z.C.W., brought guardianship proceedings in the Superior Court of California to vindicate the right granted them by the First and Fourteenth Amendments to the United States Constitution to continue their intimate, de facto parent-child relationship. The Superior Court which heard the matter rejected petitioner's constitutional claims (App. A-14); the California

Court of Appeal evaded them (App. A-5 n.1); and the California Supreme Court denied review (A-16).

This petition is timely under Supreme Court Rule 13.1. Petitioner seeks review of a final judgment of the California Court of Appeal, which was subject to discretionary review in the California Supreme Court. The petition is filed within 90 days of the California Supreme Court's July 21, 1999 order denying review. (App. A-16.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of . . . liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 3041 of the California Family Code provides in pertinent part:

> Before making an order granting custody to a person or persons other than a parent, without the consent of the parents, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child. . . .

Section 3100(a) of the California Family Code provides in pertinent part:

> (a). . . . In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

Section 7611 of the California Family Code provides in pertinent part:

> A man is presumed to be the natural father of a child if he meets the conditions . . . in any of the following subdivisions:
>
> * * * *
>
> * * * *
>
> * * * *
>
> (d) He receives the child into his home and openly holds out the child as his natural child.

Section 1514 of the California Probate Code provides in pertinent part:

> (a) . . . if it appears necessary or convenient, the court may appoint a guardian of the person . . . of the proposed ward. . . .
>
> (b) In appointing a guardian of the person, the Court is governed by Chapter 1 (commencing with section 3020) and Chapter 2 (commencing with section 3040) of Part 2 of Division 8 of the Family Code, relating to custody of a minor.

STATEMENT OF THE CASE

This petition challenges California's refusal to honor rights secured to petitioner, Kathleen Crandall ["Crandall"], and the children, Z.C.W. and K.G.W., by the First and Fourteenth Amendments to the United States Constitution.

The basic right at issue is to a judicial decree of visitation between Crandall and each child, based on their relationship as psychological parent and child and the grievous detriment to the children that would otherwise occur. Crandall contends this right is within the substantive protection for family relationships which arises from the liberty provision of the Due Process Clause of the Fourteenth Amendment. She also contends that she and her children have the right to continue their intimate association under the First Amendment. Finally, because the current state of California law is that psychological, or de facto fathers may visit with their children and de facto mothers may not, Crandall's rights under the Equal Protection Clause of the Fourteenth Amendment have been violated.

At bottom, Crandall's claim is simple: she seeks constitutional protection for her and her children's fundamental right to continue the parent-child relationship that grew up between them over years of living together as a family with – and with the consent of – respondent, Lisa Wagner ["Wagner"], who held petitioner out to the children and the world as the other parent of her biological offspring.

A. Wagner And Crandall Formed A Family In The Only Way They Could

The situation of the parties and their children is functionally no different from that of any divorced family, except that Crandall and Wagner are both women. As a result, when they formed their family in 1985, they could not solemnize the occasion by marrying, Cal. Fam. C. § 300, nor was there any other way they could establish a legal relationship between Crandall and K.G.W., Wagner's two-year old daughter (Reporter's Transcript, California Court of Appeal Case No. A079097 ["RT"] 60-62, 413-420, 428). Wagner did give Crandall a ring with three small diamonds representing herself, Crandall, and the child, acknowledging "it was wonderful to be a family." (Appellant's Appendix, California Court of Appeal Case No. A079097 ["AA"] 468, 475, RT 67.)

Similarly, three years later, when Wagner and Crandall decided to add another child to their family, there was no way both of them could establish legal parenthood of that child. Adoption of the other's biological child was not yet sanctioned in California. (AA 467, 468, RT 68-70, 74, 428.) *See, Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 841 n.8 (1991). Nor had medical science yet devised a procedure by which both of them could play a biological role in the child's conception and birth. *See,* King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 U.C.L.A. Women's L.J. 329, 342 n.49 (1995). Although they had difficulty deciding who should be the birth mother, ultimately they chose to have Wagner conceive by artificial insemination and bear their second child. (RT 68-70, AA 467.)

Throughout the five years they lived together, Crandall and Wagner did all they could to form a "real" family. They lived in the same home with their two children, fully sharing parenting and child-care responsibilities. (RT 60-62, 75-76, 78-79, 82, 89-91.) They named each other as parents on all the children's records. (RT 90-91, 202-203, 212-214.) They even gave their second child, Z.C.W., Crandall's family name as a middle name. (RT 81-82.)

Not only did Wagner, Crandall, and the children treat each other like a family, so did their own extended families, and the community as a whole. (RT 65-66, 169-172, 202, 218-219, 221-222, 248, 251-253, 294.) The children called Crandall "Mom," and she was known to the world at large as their other mother. (RT 61, 83, 89-90, 169-170, 216.) The director of the children's pre-school considered Wagner and Crandall "a couple," with both of them parenting the children equally. (RT 202, 218-222.) Wagner encouraged Crandall to fully participate in the children's lives. (RT 83, 171-172.) She cared for them at home, took them to and picked them up from school, participated in school activities, went to parent-teacher conferences, and was called in medical emergencies. (RT 82, 89-91, 203, 209, AA 561-572, 574-576.) After Z.C.W. was born, Crandall was the main financial support for the family, giving Wagner an allowance, paying all the household expenses, and purchasing a larger home for them to live in. (RT 63, 75-78, 83-87, AA 479-480.)

B. Wagner Claimed The Right As Legal Parent To Shut Crandall Out Of Their Children's Lives

When, after five years, Crandall and Wagner decided to live apart, Crandall continued to support the children and enjoyed the conventional visitation of a divorced parent – one night a week and every other weekend. (RT 97-100.) This continued for four years, until Wagner suddenly decided to cut off all contact between Crandall and the children, claiming the right to do so as their only legal parent. (RT 96-97, 163, 105-107.)

Wagner succeeded in her aim, with the help of the California courts. On her petition, without holding an evidentiary hearing, the Superior Court of Alameda County issued a restraining order forbidding any contact between Crandall and the girls (including phone calls or letters). (RT 116-117, AA 467, Appellant's Appendix, California Court of Appeal No. A075515 ["AA/DVPA"] 179, Reporter's Transcript, California Court of Appeal No. A075515 ["RT/DVPA".) Crandall appealed but the California Court of Appeal dismissed her fully briefed appeal as moot when the restraining order expired by its own terms. *See, Wagner v. Crandall,* No. A075515 (California Court of Appeal, First Appellate District, Division Four, Sept. 29, 1997).

C. Crandall Tested The Limits Of California's Ban On De Facto Parent Visitation

Crandall then filed a guardianship petition in the Superior Court of Alameda County seeking to have herself and Wagner named co-guardians of the children,

with her rights as guardian limited to visitation and Wagner retaining primary custody. (AA 6, 63-64, 335-340.) Crandall proceeded in this limited way because two prior California appellate decisions had held that a lesbian de facto parent could not meet either the standing or jurisdictional prerequisites to seeking custody as a "parent" under the state's Family Law Act or Uniform Parentage Act. *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (1991); *Curiale v. Reagan*, 222 Cal. App. 3d 1597 (1990). Both cases also held that custody rights in California are purely statutory. *Id.; see also, West v. Superior Court*, 59 Cal. App. 4th 302 (1997) (affirming no jurisdiction in California courts over proceeding by lesbian de facto mother to obtain visitation or custody).

No California appellate court had barred a lesbian de facto parent from seeking a co-guardianship of her children and nothing in the statutes appeared to prevent it. *See*, Cal. Prob. C. § 1510(a) (guardianship petition can be filed by any "relative or other person"); Cal. Prob. C. § 2106(a)(1) (authorizing appointment of co-guardians); *Guardianship of Reynolds*, 60 Cal. App. 2d 669, 677-678 (1943) (guardianship proceeding proper vehicle for maintaining child's relationship with important adult figures); *see also, Guardianship of Kaylee J.*, 55 Cal. App. 4th 1425, 1432 (1997). Moreover, three reported California appellate decisions acknowledged the power of the courts to order visitation over the legal parent's objection if clear and convincing evidence showed the children would otherwise suffer detriment. *In re Marriage of Gayden*, 229 Cal. App. 3d 1510 (1991); *In re Robin N.*, 7 Cal. App. 4th 1140 (1992); *In re Hirenia C.*, 18 Cal. App. 4th 504 (1993).

Crandall premised her visitation-only co-guardianship petition on these two bodies of law.

Crandall also sought relief under the United States Constitution. She argued that if there were no jurisdiction to award her visitation in a guardianship proceeding California had shut all avenues of judicial protection for her and her children's relationship, infringing their rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment. (AA 251-252.)[1]

After hearing four days of testimony, the Superior Court issued a decision finding it "quite clear" that "the children feel a parent-like relationship with petitioner" (App. A-11), and that Crandall had "clearly been a de facto and psychological parent . . . during the time she lived with respondent and the children and for a period of time thereafter." (App. A-14.) Despite uncontradicted and unimpeached expert testimony that the children would suffer long-term psychological injury from losing all contact with Crandall, however, the trial court concluded there was no "detriment of significance" to the children from denying her visitation. (RT 344-347, 349, 355, 468-470, 498-500, 502, AA 470:19-471:2, App. A-16.)

While rejecting Crandall's constitutional claim, the trial court did not find that the children should not see her. Quite the contrary. The court ended its opinion with the observation that Crandall "should have regular

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[1] Crandall's constitutional claims were enlarged to embrace her and her children's rights of intimate association under the First Amendment to the U.S. Constitution on appeal from the trial court's denial of her guardianship petition. (*See, e.g.*, App. A-6, n.1; A-27, n.4.)

contact with these children, but visitation in this case must flow from the good will of the parties and concern for the best interests of the children, not from a court order." (App. A-16.)

D. The Court of Appeal Let Wagner's Interest as Legal Parent Trump Crandall's And The Children's Interest In Maintaining A Relationship

Crandall appealed to the California Court of Appeal, arguing that the trial court's findings that she was no longer a de facto parent and the children were suffering no detriment were wrong on the law and the evidence. (Appellant's Opening Brief ["AOB"] 22-34, Appellant's Reply Brief ["ARB"] 20-37.) In addition she argued that, given she remained a de facto parent in law and fact, the trial court's refusal to order visitation was an invasion of her and her children's associational, due process, and equal protection rights as secured by the First and Fourteenth Amendments to the United States Constitution. (AOB 40-46, ARB 45-59.)

The appellate court flatly denied Crandall any relief, holding "there is no [California] statutory authority for a limited guardianship providing for visitation rights to a nonparent." (App. A-1, A-4.) Its opinion ignored Crandall's claim that the lower court's ruling violated the children's constitutional interests in continuing their relationship with her – an argument separately briefed on the children's behalf by amicus curiae. (App. A-1 to A-9.) It avoided addressing Crandall's individual constitutional claims by simply reciting (but not reviewing) the trial court's factual finding that she had lost her status as a de

facto parent. (App. A-3, A-6 n.1.) Finally, the court reinforced its blanket rejection of Crandall's visitation request by setting a new, higher standard for her and others like her to meet: before she could be declared a de facto parent over Wagner's objection, much less awarded visitation, she would have to show that Wagner's custody of the children was detrimental. (App. A-5 to A-6.)

This holding of the Court of Appeal is objectionable under state law for applying a change-of-custody standard to a less intrusive request for visitation. *Compare* Cal. Fam. C. § 3041 *with* Cal. Fam. C. § 3100(a); *Marriage of Gayden*, 229 Cal. App. 3d at 1517, 1520 (holding nonparent visitation to be governed by Cal. Civ. C. § 4601 [now Fam. C. § 3100(a)] as interpreted to protect "the natural liberty of parents to direct the upbringing of their children," with the result that "[w]here the parents are unified in opposition, visitation must not be allowed unless it is clearly and convincingly shown that denial of visitation would be detrimental to the child").

But the reasoning of the decision below is even more objectionable under the Constitution. Its effect is to give the legal parent who qualifies to retain custody a veto over his or her child's relationship with their other, de facto parent. It supplants California's prior accommodation of competing fundamental interests effected by such decisions as *Marriage of Gayden*, and lets the legal parent's interest in the child's care, custody, and companionship trump the child's and the de facto parent's interest in continuing their intimate, family relationship. For this and other reasons stated more fully below, the court of appeal decision has brought California law squarely into

conflict with the First and Fourteenth Amendments to the United States Constitution.

Crandall petitioned the Court of Appeal for rehearing, pointing out it had ignored her constitutional claims and evaded its constitutional obligation to independently review the facts underlying those claims (App. A-28 to A-29.) The petition for rehearing was denied. (App. A-30.) Crandall then petitioned the California Supreme Court for discretionary review, again urging her constitutional claims and the court's obligation to review the facts *de novo* to ensure that "no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982). The California Supreme Court denied review on July 21, 1999. (App. A-19.)

REASONS TO GRANT THE WRIT

With the decision below, California has closed the last of its courthouse doors to de facto parents and children like petitioner and Z.C.W., and K.G.W., declaring them no more than strangers to each other, with no right to continue the deep, loving, and psychologically crucial relationship that grew up between them over years of living as a family.

Prior California appellate court decisions held that a de facto parent like Crandall could not meet the jurisdictional or standing requirements to seek visitation or custody under California's Family Law Act, the Uniform Parentage Act, or under any common law or equitable

doctrine. *See, Nancy S. v. Michele G.*, 228 Cal. App. 3d 831; *Curiale v. Reagan*, 222 Cal. App. 3d 1597. The decision below has now put guardianship proceedings "off limits," and withdrawn California's prior promise that visitation would be granted a de facto parent like Crandall who proved by clear and convincing evidence that her children were suffering detriment from loss of all contact with her. *See, Marriage of Gayden*, 229 Cal. App. 3d 1510.

In so doing, the decision has brought California's guardianship and visitation law – as applied to petitioner and her children, and others similarly situated – into conflict with the Constitution. That is the over-arching reason this Court should grant certiorari. There are others. The decision below raises several important unsettled constitutional questions, including the contours of the interest in "family relations" accorded substantive protection by the Due Process Clause and whether a legal parent's constitutionally protected interest in the care, custody, and companionship of her child can trump both the child's and her de facto parent's interests in continuing their intimate, family-like relationship.

The latter is a question the Court has already decided to address this Term in another context. *In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 121 (1998), *cert. granted sub nom. Troxel v. Granville*, No. 99-138, 68 U.S.L.W. 3177 (Sept. 28, 1999). It is also an issue of increasing national importance as the number of American citizens living in traditional, "Leave-It-To-Beaver" families steadily declines. *See, Moore v. City of East Cleveland*, 431 U.S. 494, 505 n.14 (1977) ("[r]ecent census reports bear out the importance of family patterns other than the prototypical

nuclear family"). Twenty years ago it was estimated that only 36% of American families matched the mythic model of married father, mother, and children. Delaney, *Statutory Protection Of The Other Mother: Legally Recognizing The Relationship Between The Nonbiological Lesbian Parent And Her Child*, 43 Hastings L.J. 177, n.6 (1991). Given recognized trends, the number must be even lower now.

Non-marital and marital families where one partner has been previously married will include a de facto parent, making the number of adults and children affected by the issues here very large. Of particular note, as of 1991 it was estimated that as many as 1.5 to ten million children were living in families headed by gay or lesbian adults. *Id.* Most of those children have one legal and one de facto parent.

Other states have found ways to avoid the constitutional confrontation created by the decision below. *See, e.g., E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886 (1999) (affirming award of visitation between de facto mother and child under broad equity jurisdiction of probate court); *V.C. v. M.J.B.*, 319 N.J. Super. 103, 725 A.2d 13 (1999) (reversing denial of visitation to de facto mother under nonparent visitation statute and "general principles of equity"); *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314 (1996) (reversing order denying standing of de facto mother to seek visitation under doctrine of *in loco parentis*); *In re Custody of H.S. H-K*, 193 Wis.2d 649, 533 N.W.2d 419 (1995) (reversing order denying visitation to de facto mother under court's equitable power); *see also, A.C. v. C.B.*, 113 N.M. 581, 829 P.2d 660 (1992) (reversing dismissal of de facto mother's petition to continue relationship with child).

The question this petition raises is whether the Constitution requires a state like California to avoid a construction of its visitation statutes which denies the right of de facto parents and their children to continue their relationship. This question is of high importance to many, many American families. The Court should grant certiorari and address it.

A.

THE COURT SHOULD SETTLE SOME IMPORTANT QUESTIONS ABOUT THE SCOPE OF FAMILY RELATIONSHIPS PROTECTED BY THE FOURTEENTH AMENDMENT

This case raises several important and novel questions about the scope of protection accorded family and family-like relationships by the Due Process Clause of the Fourteenth Amendment, some of which this Court has noted in prior decisions but found it unnecessary to decide.

It is well-established, of course, that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Moore v. City of East Cleveland*, 431 U.S. at 499, quoting *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974). The Court has described the constitutionally protected interest in exceptionally broad terms, as extending to the entire "private realm of family life." *Id.*, quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). It has stated it protects family relationships that are not predicated on blood or marriage ties, *Smith v. Organization of Foster Families*, 431

U.S. 816, 843, 844 n. 49 (1977), and that the range of constitutionally sheltered "family choice[s]" goes beyond the nuclear family of "a couple and their dependent children," *Moore v. City of East Cleveland*, 431 U.S. at 500-501, 505.

In *Moore v. City of East Cleveland*, the Court explained that the broad scope of the protected interest reflects the reason for giving constitutional shelter to "rights associated with the family" in the first place. *Id.* at 501. That reason is the history and tradition of our nation, where "the institution of the family is deeply rooted" and serves to "inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-504. *Moore* itself found constitutional protection for the right of a grandmother to live as a family with her son, his son, and another of her grandsons, in part because of her role in helping to rear the children. *Id.* at 505. Stated in the terms relevant here, the grandmother in *Moore* was a de facto mother. *Id.* at 505 n.16, 508 n.2.

The Court echoed *Moore* in *Smith v. Organization of Foster Families*, 431 U.S. 816, and added another reason for finding family relationships within the ambit of the Due Process Clause – *i.e.*, the deep emotional bonds which develop when individuals live together as a family:

> "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children, as well as from the fact of blood relationship."

Id. at 844.

The Court put a primacy on the human rather than legal or blood relationships between family members with its observation that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition." *Id.* at 844, 845 (internal quotation marks and citation omitted). Acknowledging that "a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship," the Court rejected the notion that a foster family is "a mere collection of unrelated individuals" entitled to no constitutional succor. *Id.* at 844.

However, neither *Smith v. Organization of Foster Families* nor any other decision answers the question raised here: whether the Due Process Clause affords substantive protection to the important relationship which develops when an adult acts as a parent to children from birth or shortly after, living with them on a daily basis, supporting them, nurturing them, training them, and caring for them in every other conceivable capacity. That is the basic question posed by this petition.[2] It also raises the following more specific issues.

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[2] It is best answered by the oldest and most powerful of our Nation's traditions, which are recorded in the Bible. It tells the story of Sarah, who being barren, sent her maid to lie with her husband, Abraham, that Sarah might "found a family through her." Genesis 16:2 (New English Bible, 2d ed., 1970) As this story reveals, Judeo-Christian culture has long recognized that the intent to form a family which is acted upon by all parties, and reaffirmed by them through years of living as a family, defines the "family" which is recognized and accorded protection by society.

1. A Child Has An Independent Interest In Maintaining A Relationship With Her De Facto Parent Which Is Protected By The Due Process Clause

One of the specific questions raised by this case was left open by the Court in an earlier decision, to wit, "whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).

In *Michael H. v. Gerald D.*, the Court found it unnecessary to analyze the child's interest because it considered it simply the "reciprocal" of the parent's alleged liberty interest which it had already rejected. *Id.* Here, however, there is a case to be made that the children have an interest in maintaining a relationship with their de facto parent which is not the reciprocal of the parent's, but uniquely their own and perhaps even more worthy of protection under the Due Process Clause. *See*, Boccaccini & Willemsen, *Contested Adoption and The Liberty Interest of The Child*, 10 St. Thomas L.Rev. 211, 213 (1998).

Children have a unique interest in maintaining a relationship with their psychological, or de facto parent, for that is the only kind of parentage that matters to a child. As one of the experts testified at trial in this matter, "[c]hildren have no idea of what a legal parent is. Children only know a psychological parent." (RT 334:25-26.) To a child, the idea of who is their parent is a part of their core identity. They usually form this core notion during the first three years of life, out of their own day-to-day experience with the adult, the image the adult holds of him or herself as a "parent," and the community's view

of the adult as a "parent" to the child. Children don't know, or care, if their parents have a marriage certificate, or are their legal parents. (RT 328-335, 346, 503.)

Thus, to a child, the relationship with a de facto parent is the only "true" parent-child relationship. It is this fact of psychological life for children that makes it possible to put them up for adoption. If children did not form true parent-child bonds with the adults who act as their parents, adoption simply would not work. It is years of living as a family, not a decree of adoption, that turns strangers into "parent and child." (*See*, RT 330:25-28.)

Accordingly, if the Due Process Clause protects a child's relationship with her "parent" (or "parents"), it must protect her relationship with her de facto parent, for that is the only relationship which holds any significance for the child. It matters not whether the parent bears an additional label reading "biological," "natural," "legal," or "adoptive." That may be a concern of the parent, or the state, but it is not a concern of the child. Any adult so labeled who is not also a de facto parent is simply not a "parent" to the child.

These facts must shape the analysis of a child's constitutional interest in maintaining contact with her de facto parent if that analysis is to be anything other than legal fiction, and they may well lead to very different conclusions about the nature and relative importance of the child's and the adults' interests. The Court should grant certiorari to address this issue.

2. The De Facto Parent Has An Interest In Her Relationship With Her Child That Is Entitled To Substantive Protection Under The Due Process Clause

Viewed in a vacuum, the Court's prior jurisprudence supports the notion that, as a psychological, or de facto parent, Crandall's relationship with the children is protected by the Due Process Clause. But, as noted, in *Smith v. Organization of Foster Families*, 431 U.S. 816, difficult questions can arise if the de facto parent's claim of a protected liberty interests competes with another constitutionally protected family relationship. *Id.* at 846.

While this case involves a tension between competing parental interests – Crandall's as a de facto parent and Wagner's as a legal parent – it does not involve a collision of competing family interests as *Smith* did. There is only one family here – the family Wagner and Crandall jointly formed and enhanced through years of daily life, which was sustained through visitation when the adults separated, and would have been so sustained indefinitely but for Wagner's defiance of the parental bonds she intentionally wove between her children and Crandall. Affording constitutional protection to those bonds is an act of deference to Wagner's conception of the children's family, not an act in derogation of it. *Cf. Michael H. v. Gerald D.*, 491 U.S. at 130; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1977); *see also, E.N.O. v. L.M.M.*, 429 Mass. at 834, 711 N.E.2d at 894 ("family that must be accorded respect in this case is the family formed by the plaintiff, the defendant, and the child"); *Jhordan v. Mary K.*, 179 Cal. App. 3d 386, 396 ("family autonomy argument" must be judged in light of family intentionally constructed by legal parent).

The Court should grant certiorari and make clear that the de facto parent in a family intentionally formed the only way it could be – without fully symmetrical biological ties or legal sanction[3] – has a relationship with her children that warrants protection under the Due Process Clause of the Fourteenth Amendment.

B.

AN OBJECTING LEGAL PARENT CANNOT CONSTITUTIONALLY VETO VISITATION BETWEEN HER CHILDREN AND THEIR DE FACTO PARENT

The Court should also grant certiorari and hold that California has gone too far in accommodating Wagner's liberty interest at the expense of her children's and Crandall's competing interests.

The decision below gives Wagner, the legal parent, an absolute veto over visitation between her children and their de facto parent, Crandall. Without saying so, the

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[3] Same sex couples cannot marry in any state, and thus Crandall could not formalize her parent-child relationships in that way. Nor was it yet recognized that she might become a legal parent by adopting Wagner's child. *See, Nancy S. v. Michele G.*, 228 Cal. App. 3d at 841 n.8 (suggesting adoption as a means of conferring parental rights on lesbian de facto mothers). Indeed, even now official California policy opposes adoption by unmarried couples although some sympathetic judges will approve them. (RT 428, 431.) Similarly, while two women can now both participate in conception and birth of the same child and thus establish biological parentage under California law, the medical procedure making this possible was not available when Crandall and Wagner formed their family. *See*, King, *Solomon Revisited*, 5 U.C.L.A. Women's L.J. 329, 342 n.49 (1995).

opinion effectively declares "unconstitutional" the California statute which gives a court discretion to award reasonable visitation to "any [ ] person having an interest in the welfare of the child." Cal. Fam. C. § 3100(a). In that respect, the decision below is analogous to that in *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21, *cert. granted sub nom., Troxel v. Granville*, No. 99-138, 68 U.S.L.W. 3177), and raises a question which this Court has already agreed to review.

Prior to the decision below, California law required a de facto parent like Crandall to prove the children would suffer injury (or "detriment") if deprived of visitation. *Marriage of Gayden*, 229 Cal. App. 3d at 1520, 1521-1522. This was a judicial gloss on the text of Family Code § 3100(a) (authorizing the award of visitation to "any other person having an interest in the welfare of the child") adopted by the California Court of Appeal to avoid invading the objecting legal parent's "natural liberty . . . to direct the upbringing of [her] children." *Id.* at 1517, citing *Prince v. Massachusetts*, 321 U.S. 158.

At trial, Crandall made the showing required by *Gayden* (App. A-27 to A-29), but the Court of Appeal still denied her visitation. It did so by holding that no one can be granted de facto parent visitation over the legal parent's objection unless they prove that parental custody of the children is detrimental. (App. A-5 to A-6.) Under the California custody statutes, however, such a showing is enough to deprive a parent of custody. *See* Cal. Fam. C. § 3041. The decision below thus makes the legal parent's custody and the de facto parent's visitation a "zero-sum game" – the child may have one or the other, but not both. Any legal parent who qualifies to retain custody can

veto visitation between her children and their de facto parent. This is not an accommodation of competing parental interests; it is the exaltation of one to the exclusion of the other.

It is an equally wholesale sacrifice of the children's liberty interest in retaining a relationship with their de facto parent. Under the *Gayden* decision, California made the test for granting visitation over the legal parent's objection whether the children would suffer detriment from losing contact with the de facto parent. That test acknowledges, and affords protection to, the children's interest in maintaining a relationship with their de facto parent. When the focus shifts to whether the children are suffering detriment from being in their legal parent's custody, the children's interest in retaining contact with their de facto parent drops out of the equation altogether. As a result, California law now sacrifices the children's liberty interest (as well as the de facto parent's) in favor of the legal parent's.

In doing so, California has gone too far. A legal parent's liberty interest must give way where necessary to prevent injury to a child. As the Court stated in *Prince v. Massachusetts*, 321 U.S. at 168, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection." Where the source of danger to the child arises from the parent, "legislation appropriately designed to reach such evils is within the state's policy power . . . against the parent's claim to control of the child." *Id.* at 169. Applied to the present facts, *Prince* teaches that when a legal

parent's denial of contact between her child and her child's de facto parent creates a risk of detriment or injury to the child, the Constitution permits an order for visitation to be entered over the objection of the legal parent. *See, Marriage of Gayden,* 229 Cal. App. 3d at 1517-1520, n.6; *see also, E.N.O. v. L.M.M.,* 429 Mass. at 832-833, 711 N.E.2d at 893. The Court should grant certiorari and make this clear.

C.

CRANDALL AND HER CHILDREN HAVE A RIGHT OF INTIMATE ASSOCIATION THAT IS PROTECTED BY THE FIRST AMENDMENT

This case also raises the novel question whether Crandall and her children have a right of intimate association which is protected by the First Amendment, whether or not it also is protected by the Fourteenth Amendment.

In *Roberts v. United States Jaycees,* 468 U.S. 609 (1984), the Court sketched one branch of the "freedom of association" protected by the First Amendment in terms which appear to be fully applicable to the relationship between Crandall and her children:

> "[T]he Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty."

Id. at 617-618. Going on to describe the nature of the protected intimate relationship, the Court said:

> "[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover . . . individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference [ ] safeguards the ability independently to define one's identity that is central to any concept of liberty."

Id. at 618-619 (citations omitted).

While citing many of its Fourteenth Amendment decisions in support of these statements (some of which are discussed above), and suggesting "family relationships" as an example of the associational interest protected by the First Amendment, the Court nowhere stated that the right of intimate association protected by the First Amendment has precisely the same contours as the liberty interest accorded family relationships under the Due Process Clause of the Fourteenth Amendment. Indeed, the Court made the broad assertion that any relationship which is "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion

from others in critical aspects of the relationship" is "likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty" and thus warrant First Amendment protection.

Of course, Crandall's relationship with her children has these very characteristics. The Court should grant certiorari and declare that, as a result, it is protected from arbitrary state interference under the First Amendment. The State of California arbitrarily interfered in Crandall's de facto parent relationship with the children by giving Wagner a veto over any and all contact between them, despite clear and convincing evidence that doing so would work serious psychological and emotional injury on the children. The Court should grant certiorari and make clear that this California cannot do under the Constitution.

D.

CALIFORNIA HAS VIOLATED CRANDALL'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE BY DENYING HER VISITATION WHILE ACCORDING IT TO DE FACTO FATHERS

The Court should grant certiorari and further hold that California has violated Crandall's rights under the Equal Protection Clause of the Fourteenth Amendment by denying her an opportunity to obtain visitation rights but according visitation rights to de facto fathers. *See, Caban v. Mohammed*, 441 U.S. 380, 381, 391 (1979) (statute drawing unsubstantiated distinction between rights of unmarried mothers and unmarried fathers to consent to

adoption violates Equal Protection Clause); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (statute removing custody from unmarried father without hearing on fitness but according such hearings to other parents violates Equal Protection Clause).

The California Court of Appeal has construed its Family Code to permit an order for visitation between a psychological father and the child who is the subject of guardianship proceedings. *See, Guardianship of Martha M.*, 204 Cal. App. 3d 909 (1988) (claim that psychological father "is ineligible for visitation because he is a 'stranger' . . . without a relationship based on consanguinity or kinship through marriage. . . . is patently unsound," applying Cal. Civ. C. § 4601 [identically worded predecessor to Cal. Fam. C. § 3100(a)]). The only difference between *Martha M.* and this case is the gender of the de facto parent seeking visitation.

Moreover, the very appellate court which denied Crandall de facto parent status has held that a psychological, or de facto father may assert his parental status over the objection of the child's biological father if he has received the child into his home and held it out to the world as his own. *Steven W. v. Matthew S.*, 33 Cal. App. 4th 1108, 1116-1117 (1995) (contest over legal parentage resolved in de facto father's favor on basis of California's "strong policy in favor of preserving the ongoing father and child relationship").

Crandall, too, received the children into her home and held them out to the world as her own. Thus, were she a man, she would have qualified as a "presumed parent" under California Family Code 7611(d) with the

right to assert her interests in parentage, even over Wagner's objection. California's interest in adopting section 7611(d) (as identified by the court in *Steven W.*) applies as clearly to Crandall's relationship with her children as it does to any de facto father's relationship with his:

> "The state has an interest in preserving and protecting the developed parent-child relationships which give young children social and emotional strength and stability. The courts have repeatedly held, in applying paternity presumptions, that the extant father-child relationship is to be preserved at the cost of biological ties.
>
> . . . . A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved. . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity."

Id. at 1116 (internal quotation marks and citations omitted).

Nevertheless, Crandall has never asked the state to go as far as it did in protecting the de facto father's relationship in *Steven W.* He was permitted to supplant the biological father as the child's legal parent. *Id.* at 1117. All Crandall has ever asked is for the state to order visitation so she might retain the role she has played in the children's lives since birth or shortly thereafter. California did as much for the biological father in *Steven W. Id.* ("our decision today does not limit provisions for visitation for all interest parties"). Its willingness to be so much more solicitous of the established parent-child relationships of fathers than mothers cannot be squared with

its own asserted interest, or with the Equal Protection Clause.

Decisions concerning custody and visitation which turn directly on such characteristics as race and gender violate the Equal Protection Clause of the Fourteenth Amendment. *Palmore v. Sidoti*, 466 U.S. 419 (1984); *Reed v. Reed*, 404 U.S. 71, 76 (1971). "The mandate of impartiality" falls not only on the legislature which writes the laws, but on judges, "those state actors who implement state laws." *Lehr v. Robertson*, 463 U.S. 248, 265 n.24 (sovereign "may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose"). The Court should grant certiorari and make clear that the decision below runs afoul of this principle.

CONCLUSION

This Court recognizes that the Constitution protects both the family as the bedrock of our Nation and the intimate bonds between citizens as the foundation of their individual liberty. On behalf of her children, petitioner asks that this Court acknowledge that the relationship between her and her children is one of "family"

and/or "intimate association" and thus within the constitutional embrace.

Respectfully submitted,

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October 18, 1999

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

Guardianship of Z.C.W. and K.G.W.	
KATHLEEN C., Plaintiff and Appellant, v. LISA W., Defendant and Respondent.	A079097 (Alameda County Super. Ct. No. 248043-1)

(Filed Apr. 19, 1999)

In this guardianship proceeding, Kathleen C. (appellant), seeks visitation rights with the children of respondent Lisa W. She contends that she is entitled to visitation rights despite the objections of respondent, the children's biological mother, because she is the lesbian de facto parent of the children. We conclude that this issue is more appropriately addressed to the Legislature and that appellant is not entitled to any relief here.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

FACTUAL BACKGROUND

In 1984, the parties became involved in a lesbian relationship and began living together in February 1985. Respondent's daughter, K.G.W., then almost three years old, lived with them. In 1986, the parties decided to have another child, and respondent became pregnant by artificial insemination. Z.C.W. was born in 1987 and the parties gave the child appellant's surname as a middle name. Appellant was regularly involved in the parenting and support of both children until the parties separated in 1990.

The parties thereafter agreed to a visitation agreement under which appellant had the children on alternate weekends. Appellant regularly visited with the children until November 1994 when respondent terminated the agreement. Appellant continued to maintain contact with the children through letters and occasionally spoke with K.G.W. on the telephone. In early 1996, appellant visited with the children surreptitiously on several occasions. Respondent learned of these visits and sought a restraining order under the Domestic Violence Prevention Act. In that action, the trial court issued a temporary restraining order on April 25, 1996 against appellant in favor of respondent and her children preventing appellant from contacting them. Following a hearing, the court granted a restraining order against appellant for a one year period to July 1, 1997, prohibiting appellant from contacting respondent and her children.

On August 15, 1996, appellant filed a petition for guardianship of the children. She contended that she was the children's de facto parent and that the children were

being harmed because of respondent's decision to sever their relationship with her. Respondent moved to dismiss the petition, arguing that the restraining order precluded a guardianship and that there were no grounds for guardianship because appellant could not prove that respondent's parental custody was detrimental to the children. On September 27, 1996, the court deferred ruling on the motion, appointed counsel for the children, and set the matter for hearing on October 28, 1996. The trial court ultimately denied the motion on procedural grounds.

A trial on the guardianship petition proceeded on March 24, 1997. The trial court found that appellant was a de facto and psychological parent of the children during the time she lived with respondent but that she subsequently lost that status. The court denied the petition for a guardianship, finding that there was no evidence of "any detriment of significance" to the children remaining with respondent without visitation with appellant. The trial court subsequently denied respondent's application for an award of attorney's fees and costs as sanctions. The court further ordered that each party pay $4,500 toward the fees incurred by the court-appointed attorney for the children.

DISCUSSION

I.

The courts of appeal have previously decided that a lesbian partner who is not a biological or adoptive parent is not entitled to custody of children conceived during a same sex bilateral relationship. In *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597, the court held that a nonparent had

no standing to assert a claim for custody or visitation as against a child's natural mother upon termination of the lesbian relationship. The court explained that "[j]urisdiction to adjudicate custody depends upon some proceeding properly before the court in which custody is at issue such as dissolution (Civ. Code, § 4350 et seq.), guardianship (Prob. Code, § 1400 et seq.), or dependency (Welf. & Inst. Code, §§ 600, 725-729). . . . The Legislature has not conferred upon one in plaintiff's position, a nonparent in a same-sex bilateral relationship, any right of custody or visitation upon termination of the relationship." (*Id.* at p. 1600.) Similarly, the court in *West v. Superior Court* (1997) 59 Cal.App.4th 302, 309, held that the courts have no jurisdiction to entertain the petition of a nonparent in a lesbian relationship for custody and visitation rights. Finally, in *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831, 836, Division One of this court held that a lesbian partner who was not the adoptive or biological parent of children conceived during a lesbian relationship was not entitled to seek custody or visitation of the children under the Uniform Parentage Act (Civ. Code, § 7000 et seq.).

Appellant's attempt to obtain visitation rights through a guardianship also fails. As the trial court recognized, there are no cases granting a guardianship in the absence of clear and convincing evidence that parental custody is detrimental to the children. (See Fam. Code, § 3041; *In re B.G.* (1974) 11 Cal.3d 679, 699.) A finding that an award of custody to the parents would be detrimental to the child is essential before a court may make an order granting custody to a nonparent. (*Ibid.*) Further, there is

no statutory authority for a limited guardianship providing for visitation rights to a nonparent. The issue is one that must be addressed to the Legislature.

Finally, appellant cannot prevail on her argument that she is entitled to visitation rights because she is a de facto parent of the children. The term, de facto parent, has its genesis in the juvenile dependency system and generally has been used to refer to foster parents caring for dependent children. (See *In re B.G., supra,* 11 Cal.3d at p. 692.) The definition of a de facto parent as used in juvenile dependency proceedings and the limited rights of de facto parents are set forth in Cal. Rules of Court, rules 1401, 1410 and 1412, respectively. As the California Supreme Court has explained, "[t]he de facto parenthood doctrine simply recognizes that persons who have provided a child with daily parental concern, affection, and care over substantial time may develop legitimate interests and perspectives, and may also present a custodial alternative, which should not be ignored *in a juvenile dependency proceeding*. The standing accorded de facto parents has no basis independent of these concerns." (*In re Kieshia E.* (1993) 6 Cal.4th 68, 77-78, emphasis added.) The courts nonetheless have recognized de facto or psychological parent status in guardianship and custody proceedings when there was clear and convincing evidence that the continued custody of a child by the biological parents was detrimental to the child. (See, e.g., *Guardianship of Philip B.* (1983) 139 Cal.App.3d 407, 420-421 [de facto or psychological parents of Down's Syndrome child granted guardianship over objection of child's biological parents who neglected child's health needs and remained physically and emotionally detached from him]; *In re*

Volkiland (1977) 74 Cal.App.3d 674, 679-680 [award of custody to grandmother who was the de facto parent proper where there was a showing that an award of custody to the child's mother would be detrimental to the child].) Aside from dependency cases and those specific instances in guardianship and custody proceedings where there was clear and convincing evidence that parental custody was detrimental to a child, California courts have not accorded de facto parent status to a nonparent over the objection of the biological parents. (See *Nancy S. v. Michele G., supra,* 228 Cal.App.3d at p. 837 and cases cited therein [recognizing that even if a lesbian partner was granted de facto parent status, she would not be entitled to custody in the absence of a finding that parental custody was detrimental to the children].) Hence, although appellant exhibited the characteristics of a de facto parent during her relationship with respondent, absent any legislative or case authority granting a nonparent visitation rights over the objection of the biological parent and in the absence of any showing of detriment to the child, we cannot grant those rights here.[1]

As is true of most family law cases, this is a difficult case for all involved and we encourage the parties, as did the trial court, to resolve their differences for the benefit of the children.

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[1] Inasmuch as appellant is not a de facto parent, she cannot establish that she was denied constitutional rights to equal protection, free association and due process.

II.

In her cross-appeal, respondent contends that the trial court erred in not imposing sanctions and in requiring her to pay fees for the court appointed attorney for the children. The trial court denied sanctions, finding that the "action was initiated appropriately for a proper purpose based upon a 'nonfrivolous argument for . . . the establishment of new law.' (Code Civ. Proc. § 128.7, subd. (b)(2).)" The trial court's ruling was correct.

The record demonstrates that appellant sought to gain visitation rights of the children using a novel approach through guardianship law. As appellant points out, that other states have adopted the approach urged by her demonstrates that her action is not frivolous. (See *Jones v. Jones* (1986) 179 Cal.App.3d 1011, 1018 [action not frivolous despite lack of precedential support given trend in California law to create new causes of action and diverse approaches taken by other states].)[2] We do not

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[2] Appellant cites cases in Pennsylvania and Wisconsin that have held that a lesbian partner has standing to seek partial custody or visitation of a child born during her relationship with the child's biological mother. (See *J.A.L. v. E.P.H.* (1996) 453 Pa.Super. 78 [682 A.2d 1314] [lesbian partner who stood in loco parentis to child of former lesbian partner was entitled to seek partial custody]; *Holtzman v. Knott* (1994) 193 Wis.2d 649 [533 N.W.2d 419] [lesbian partner who can establish parent-like relationship with child born during relationship with child's biological mother may petition for visitation rights].) More recently, a New Jersey court followed the Wisconsin court's opinion in *Holtzman, supra,* and held that a lesbian plaintiff who had a " 'parent-type relationship' " with children born during a lesbian relationship was entitled to visitation given evidence that it was in the children's best interest. (*V.C. v. M.J.B.* (1999) 319 N.J.Super. 103 [725 A.2d 13].)

find that the action was frivolous or that it was initiated in bad faith. (See Code Civ. Proc., § 128.5; *Llamas v. Diaz* (1990) 218 Cal.App.3d 1043, 1047 [imposition of sanctions requires finding that action is frivolous and instituted in bad faith].)

Finally, respondent's argument that the court erred in appointing an attorney for the children and in requiring her to pay for a portion of her fees is without merit.

The trial court's order appointing an attorney to represent the children was made in response to respondent's motion to dismiss the petition for guardianship. The trial court determined that the motion raised issues of fact regarding whether granting custody to respondent would be detrimental to the children and whether granting custody to appellant was required to serve the best interests of the children. The court therefore deferred ruling on the motion and referred the parties to mediation with Dr. Chris Hodson of Family Court Services. The court further ordered the children to meet with Dr. Hodson in order to determine their wishes and appointed them counsel to represent their interests and to assist them in their communication with Dr. Hodson.

The trial court's order appointing counsel for the children was proper. Probate Code section 1470 authorizes the appointment of counsel for a minor in guardianship proceeding. Further, Probate Code sections 1513, subdivision (a)(3) and 1514, subdivision (e)(2) make clear that a child's preferences shall be considered in determining the appropriateness of a guardianship. Finally, Probate Code section 1470, subdivision (c)(2) authorizes the trial court to order that the fees for a court-appointed

counsel be paid by the parents "in any proportions the court deems just." In light of the unique circumstances of this case, the court's order requiring the parties to share the cost of the fees in an equal manner was not an abuse of discretion.

Respondent also requests that we impose sanctions on appellant for the filing of a frivolous appeal. Inasmuch as we have concluded that appellant's action was not frivolous, we decline to impose sanctions.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.

Hanlon, P.J.

We concur:

Poche, J.

Reardon, J.

(*Guardianship of Z.C.W. & K.G.W.; Kathleen C. v. Lisa W.*, A079097)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

Guardianship of	No. 248043-1
CHILDREN OF LISA WAGNER	REVISED STATEMENT OF DECISION AFTER TRIAL
Minors	(Filed May 12, 1997)

_____/

This matter was tried before Judge Roderic Duncan, a retired judge duly assigned to hear the matter March 24, 25, 26 and 27, 1997. Petitioner Kathleen Crandall was present and represented by Alice Philipson, Esq. and respondent Lisa Wagner was present and represented by Carol Amyx, Esq. Diana Richmond, Esq., the attorney appointed to represent the children, was also present. Testimony having been taken, documentary evidence having been received and the matter having been argued and submitted, the court issued its decision March 31, 1997. Petitioner requested a Statement of Decision on specified issues April 9 and supplemented that request April 10. After consideration of several proposed statements and objections thereto, the court issues this final Revised Statement of Decision.

Petitioner Kathleen Crandall and Respondent Lisa Wagner were lesbian partners from sometime in 1984 until 1990. Wagner is the mother of two children whose names will not be used in this decision because of their very reasonable desire for privacy. The older child was born to respondent as the result of artificial insemination April 26, 1982 and the younger on April 11, 1987. The

parties jointly planned the conception of the younger child. The identity of the sperm donors is unknown.

When Crandall and Wagner terminated their relationship the children were 3 and 8 years old. Crandall alleges that she became a de facto parent of the children during the five plus years she resided with them and their mother in Oakland and Berkeley. She has proven during trial that with the cooperation of respondent, a close family relationship developed as she helped to raise the children and provided day-to-day care and nurture. She made a major contribution to the financial costs of the household.

There is no question concerning Crandall's very substantial connection with the subject children, one of whom bears her surname as a middle name. The testimony of Crandall's father, who considered himself a grandfather to these children, was one of the many moving moments during a four-day trial. And it is quite clear the children feel a parent-like relationship with petitioner and wish only that these parties would settle this dispute out of court.

After the break-up, Wagner allowed Crandall to visit with the children on a regular schedule until November 1994, when she informed Crandall visitation was to cease. Despite Wagner's wishes, Crandall continued to contact the children surreptitiously in person and by telephone. When Wagner learned this was happening in April 1996, she obtained a Domestic Violence Prevention Act order restraining Crandall from contacting her or the children and from coming within 100 yards of them or their residence.

On August 15, 1996 Crandall filed a Petition for Appointment of Guardian of Minors requesting that she be appointed the guardian of the children. The Judicial Council form she was required to use permits only a request for full guardianship of the person and/or estate, but Crandall has always made it clear that her suit is intended only as a vehicle for obtaining a court order allowing her to resume the visitation she had prior to November 1994.

Guardianship is an unusual vehicle for what Crandall is seeking, but it is all that is available under current California law for a lesbian or person similarly situated seeking court-ordered contact with children with whom she has no biological or adoptive connection:

• if she and Wagner had married, she could have filed for a dissolution of the marriage (or a DVPA action) and requested step-parent visitation – but, of course, lesbians are not allowed to marry,

• if she had completed an adoption of the children prior to the break-up, she could have used a Uniform Parentage Act suit to obtain visitation – but she states she was dissuaded from doing that when she learned from attorney (now Judge) Donna J. Hitchens in 1986 that it was not clear at that time that a court would grant a homosexual adoption,

• if the children had been dependents of the juvenile court, a request for visitation would have been considered by that court – but, despite the need for several

"raisin-ectomies"[1] to be performed, there has never been grounds for juvenile court jurisdiction.

When Crandall's visitation was cut off in 1994, guardianship appeared to be the only possible legal vehicle for her to maintain a close relationship with the children.

Wagner has sought dismissal of this guardianship action, citing a long string of relevant California cases which hold that such an order cannot be granted unless there is clear and convincing evidence that parental custody is somehow detrimental to the children. There is no case granting a petition for guardianship against a natural parent who has cared for her children with anywhere near the devotion and skill Wagner has proved that she has exercised.

But Crandall is not seeking a traditional guardianship. She asks instead that this court do something no California court has ever done: split off one of the attributes of a guardianship and award her the right to some limited visitation. In reversing a lower court in a situation quite similar to the instant case, the appellate division of the Superior Court in Pennsylvania has stated:

> "In today's society, where increased mobility, changes in social mores and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt

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[1] The parties were called to the pre-school on occasion when assistance was required in the removal of a raisin lodged in the nose of one of the children.

> those principles to the interests of each particular child." J.A.L. v. E.P.H. (1996) 02456 Philadelphia 1995.

Lord Denning stated in great Britain in 1981:

> "My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule – or even to change it – so as to do justice in the instant case before him."

In the spirit of these statements, the undersigned would be inclined to find that a limited "visitation guardianship" should be granted if it is proven that a natural parent harms her children unnecessarily by denying them visitation with a meritorious de facto parent who is out of favor.

Thus the issue before this court is whether this is an appropriate case for such an interference with a parent's right to manage her family. After considerable reflection, the court concludes it is not.

Petitioner was clearly a dc facto and psychological parent of the subject children during the time she lived with respondent and the children and for a period of time thereafter, but for a number of reasons she lost that status in the period that followed. However, It [sic] was clear from the very impressive testimony of Drs. Heineman and Hodson, that a very important relationship continues between the children and petitioner. Despite respondent's request for such a ruling, the court is not prepared to say that it remains at the level of "psychological parent."

Crandall has made some serious mistakes in her conduct with the children since the break-up of the parties. During the time she was granted visitation, she has sometimes been reckless about returning the children on time or in following the rules set by their mother. After Wagner attempted to terminate visitation, she undermined parental authority by engaging in secret contacts. She has sent the children excessive gifts. Exhibit N, the "mommy rating sheet" she apparently prepared, was a truly outrageous invasion of Wagner's relationship with her younger child. It is not clear that Crandall would act responsibly if she were granted court-ordered visitation. This is one reason the court is not granting the relief sought by petitioner.

Another reason is that Wagner's parenting has been almost exemplary. The only appropriate criticism heard during the trial was that she "has a terrible blind spot about their contact with Kathy."

Also significant is the fact that the pain of the children over the loss of this important relationship seems to have subsided over the year since the restraining order went into effect. Apparently this has been caused in part by the anger they feel because they believe she is responsible for a newspaper story that appeared about this lawsuit.

Petitioner has not shown that significant psychological harm is now occurring to the children, which harm could be avoided by visitation with her. As Dr. Hodson testified, the children have a deep sadness about what has happened to their relationship with petitioner and, despite any angry statements to the contrary, would like

it to resume. However, the court is not convinced any detriment of significance has been shown by the children remaining in the sole custody of respondent without visitation with petitioner.

The court finds no violation of either petitioner's or the children's Constitutional equal protection or due process rights in the denial of the visitation requested.

Kathy Crandall should have regular contact with these children, but visitation in this case must flow from the good will of the parties and concern for the best interests of the children, not from a court order. With all of the stress of litigation, the huge legal bills that have been created and some hurtful words spoken during trial, it will be difficult for the parties to cooperate in straightening out this dispute. But resolve it they should – out of court.

May 5, 1997

/s/ Roderic Duncan

Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

Guardianship of	)	No. 248043-1
	)	
CHILDREN OF LISA WAGNER,	)	JUDGMENT DENYING PETITION FOR APPOINTMENT OF GUARDIAN
	)	
Minors.	)	
	)	
	)	(Filed May 12, 1997)

This matter was tried before the Honorable Roderic Duncan, Judge, Retired, on March 24, 25, 26, and 27, 1997. Petitioner Kathleen Crandall was present and represented by Alice Philipson; respondent Lisa Wagner was present and represented by Carol Amyx; the court-appointed attorney Diana Richmond was also present. Testimony having been taken, documentary evidence having been received, the matter having been argued and submitted, the court having rendered its Statement of Decision, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the petition for appointment of guardian of the children of Lisa Wagner is denied.

Dated: MAY 12 1997

/s/ Roderic Duncan
JUDGE OF THE SUPERIOR COURT

First Appellate District, Division Four, No. A079097
S079355

IN THE SUPREME COURT OF CALIFORNIA

KATHLEEN C., Appellant

v.

LISA W., Respondent

(Filed Jul. 21, 1999)

Petition for review DENIED.

Mosk, J., and Brown, J., are of the opinion the petition should be granted.

The request for judicial notice is denied.

George
Chief Justice

No. A 079097

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT, DIVISION FOUR

In re the Guardianship of Z.C.W. and K.G.W. KATHLEEN CRANDALL, Plaintiff and Appellant, vs. LISA WAGNER, Defendant and Respondent.	A 079097 (Alameda Cty. Sup. Court No. 248043-1)

APPELLANT'S PETITION FOR REHEARING

Appeal from the Order of the
Superior Court of Alameda County
The Honorable Roderic Duncan, Judge

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INTRODUCTION

The Court's opinion issued March 19, 1999 completely fails to wrestle with the socially and constitutionally compelling issues raised by this litigation. It omits all facts regarding appellant's continuing status as a de facto parent and the detriment to her daughters from being left without any contact with her, omits any review of the legal or evidentiary support for the trial court's findings on those points, fails to cite or discuss the relevant guardianship statutes, ignores the Court's own published opinions which lead directly to reversal of the trial court's order[1], and announces a new rule of law injecting into the doctrinal determinants of de facto parenthood the legal parent's attitude toward that relationship.

As a result, the Court has issued a decision which is infected with legal and constitutional error, and works a dramatic miscarriage of justice. It should grant a rehearing, vacate its opinion of March 19, 1999, and issue a new opinion reversing the trial court's order denying appellant's guardianship petition. (*Estate of Jessup* (1889) 81 Cal.408, 471-472.)

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[1] *In re Marriage of Gayden* (1991) 229 Cal. App. 3d 1510; *In re Hirenia C.* (1993) 18 Cal. App. 4th 504. *See* Appellant's Opening Brief ["AOB"] AOB 23-24; Appellant's Reply Brief ["ARB"] 7-10.

ARGUMENT

I.

THE COURT ASSERTED THAT EXISTING GUARDIANSHIP STATUTES DO NOT AUTHORIZE THE RELIEF SOUGHT WITHOUT EVER CITING OR ANALYZING THOSE STATUTES, OR THE CASES APPLYING THEM

The Court's opinion states "there is no statutory authority for a limited guardianship providing for visitation rights to a nonparent" (Slip Opinion, pages 3-4 ["opin. 3-4"]), yet it never cites, quotes, or discusses the various guardianship statutes on which appellant relied, (*See* AOB 39-40; ARB 37-43.) Had the Court fully reviewed the pertinent authorities, it would undoubtedly have seen the error in its flat rejection of appellant's contention.

For example, the Court has ignored the broad standing accorded by the guardianship statutes, under which "a[ny] relative or other person" can bring a petition. (Prob.C. § 1510(a).) This language expressly encompasses a "nonparent" (opin. 4); and surely embraces a party like appellant whom the uncontroverted evidence showed to be a de facto parent (AOB 5-11, 15-17, 22-24; ARB 13-14, 20-23). The Court also ignored the provision for co-guardianship (Prob.C. § 2105) and those permitting limitations on a guardian's exercise of power (Prob.C. §§ 2102, 2351) which, taken together, permit a trial court to name both the legal and de facto parents as guardians, giving the legal parent sole control over the ward's domicile and the de facto parent no right but visitation. (See AOB 39-40; ARB 37-43.)

Concomitantly, the Court ignored the case law cited by appellant, which documents that the extraordinary flexibility afforded trial courts in guardianship proceedings can be used to protect the very interest asserted here – i.e., the minors' interest in continuing contact with one they view as their other mother. (*See Guardianship of Shannon* (1933) 218 Cal.490, 493; AOB 39, citing *Guardianship of Martha M.* (1988) 204 Cal. App. 3d 909; ARB 44-45, citing *Guardianship of Reynolds* (1943) 60 Cal. App. 2d 669.) The Court's failure to discuss these decisions is as inexplicable as its failure to address the existing guardianship statutes. It should grant a rehearing to do so.

II.

THE COURT'S OPINION MISSTATES THE LAW OF DE FACTO PARENT, INJECTING PARENTAL APPROVAL INTO A DOCTRINAL FORMULA WHICH LOOKS ONLY TO THE NATURE AND QUALITY OF THE ADULT-CHILD RELATIONSHIP

The Court narrowly escapes the error of stating the de facto parent doctrine has no application outside of juvenile dependency proceedings (opin. 4) but then makes the equally egregious mistake of asserting that, except "where there was clear and convincing evidence that parental custody was detrimental to a child, ***California courts have not accorded de facto parent status to a nonparent over the objection of the biological parents***" (*Id.*)[2].

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[2] The Court also errs in characterizing the rights of de facto parents as "limited," and circumscribed by the provisions of California Rules of Court 1401, 1410, and 1412. (Opin. 4.) The

Objection by the "biological parents" plays no doctrinal role in the determination whether an adult is a de facto parent to a child – whether or not there is evidence of detriment. The question is initially one of psychological fact, which depends on the extent of the adult's contact with and care for the child, and how the child has come to view the adult. (*In re B.G.* (1973) 11 Cal.3d 679, 692 n.18; *see also, Guardianship of Phillip B.* (1983) 139 Cal. App. 3d 407, 419-420.) Maintaining that status (as least in the courts' eyes) depends on the de facto parent's not acting in ways "fundamentally at odds with the role of a parent," such as by physically or sexually abusing the child. (*In re Kieshia E.* (1993) 6 Cal.4th 68, 78; *see also* ARB 20-22.)

No California case before this one has suggested that objection by a biological or legal parent is a legitimate factor to consider in deciding to grant or deny de facto parent status. This Court has erred in doing so, and in taking a crabbed view of the doctrine generally, and should grant a rehearing to correct this significant legal error.

Rules of Court set out only the procedural rights of de facto parents in juvenile dependency proceedings. The substantive rights of de facto parents have been characterized by the Supreme Court as "substantial" and including an "interest in the companionship, care, custody and management" of the child." (*In re B.G.*, 11 Cal.3d at 692.) The Court has also noted the legislative protection given these substantive rights under the Family Law Act, with the passage of Civil Code § 4600, predecessor to Family Code § 3401. This statute, which applies in guardianship proceedings (Prob.C. § 1514[b]) is the very basis of appellant's claim to a protectible right of visitation with her daughters.

III.

THE COURT'S OPINION FAILS TO REVIEW THE QUESTION WHETHER, AS A MATTER OF LAW, APPELLANT REMAINED A DE FACTO PARENT AND THEREFORE CONSTITUTIONALLY ENTITLED TO VISITATION WITH HER CHILDREN, AND THEY WITH HER

The Court's opinion asserts that "appellant is not a de facto parent" but nowhere explains the legal or factual basis for that assertion. (Opin. 5 n.1.) It omits any statement of the relevant material facts, as well as any discussion of appellant's claim that, given those facts and the applicable legal standard, she retained her status as a de facto parent at the time of trial ***as a matter of law***. (*See* AOB 5-13, 15-17 (omitted facts), 25-32 (omitted issue); ARB 20-23 (same).) Only by ignoring these facts and refusing to review this claim was the Court in a position to evade the substantial constitutional question raised in this case, which is whether the State was obligated under the First, Fifth, and Fourteenth Amendments to order visitation over respondent's objection.[3]

This Court has a particular duty to review the factual premises to appellant's constitutional claims.[4] (*Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal.4th 860, 883-884). The Supreme Court has made clear that "[i]t is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be

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[3] See opin. 5, n.1.

[4] Those claims include the protection of her own and her children's associational, due process, and equal protection rights to continued visitation.

defeated by insubstantial findings of fact screening reality." (*Id.*; quoting *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 924.). As appellant showed in her detailed review of the record, the trial court's finding that she lost her status as a de facto parent is the sort of "insubstantial finding of fact screening reality," which the Supreme Court has condemned, and which this Court cannot permit to stand without judicial review.

This Court should grant a rehearing and review the question – which on this record is one of law – whether appellant remained a de facto parent to her children at the time of trial.

IV.

THE COURT OMITS ANY CONSIDERATION OF APPELLANT'S CLAIM THAT, AS A MATTER OF LAW, HER CHILDREN WILL SUFFER DETRIMENT FROM BEING DENIED VISITATION, AND OF HER AND HER CHILDREN'S RESULTING CONSTITUTIONAL CLAIMS

Similarly, the Court ignores appellant's claim that the record at trial established as a matter of law that her children will suffer detriment from being left solely in the custody of their biological mother without any visitation with her. (AOB 17-21 (facts), 32-34 (argument); ARB 24-37 (argument).) The court omits any discussion of the relevant facts, any consideration of the governing law, and writes as if this issue were never brought before it. The Court's refusal to address this issue should also be redressed by grant of a rehearing and, ultimately, by reversal of the trial court's order.

CONCLUSION

This appeal raises important legal and constitutional questions which this Court, in essence, has refused to address. It should grant a rehearing, decide all the issues tendered to it, and issue a new opinion reversing the trial court's order denying appellant's petition for guardianship.

DATED: May 3, 1999

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In re the Guardianship of Z. C. W. and K. G. W.

A079097
Alameda County No. 2480431

(Filed May 18, 1999)

BY THE COURT:

The petition for rehearing is denied.

Date: MAY 18 1999 HANLON, P.J.